IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 504 OF 2007
WITH
CIVIL APPLICATION NO. 694 OF 2007
IN
APPEAL FROM ORDER NO.504 OF 2007
IN
NOTICE OF MOTION NO. 1079 OF 2007
IN
L.C.SUIT NO. 1089 /2007

1. Vipin Chunilal Seth & Anr. .. Appellants./ (Org.Plaintiffs)

V/s.

1. M/s. Raja Developer & Ors. .. Respondents.

Mr.Sanjay Jain with Mr. Ashok Purohit i/by M/s. Zohair & Co. Advocate for the Appellants.

Mr.P.K.Dhakephalkar with Mrs. Vandana Mahadik for the Respondent No.1.

Ms.I.K.Sanajani i/by M/s. S.N.Associates for the Respondent No.2.

Mrs. Geeta Jogalekar, Advocate for the Respondent No.3.

CORAM : D.B.BHOSALE, J.

DATED : 23RD NOVEMBER, 2007.

P.C. :-

. Heard learned counsel for the parties.

2. This Appeal From Order is directed against an order dated 13.06.2007 passed by the City Civil Court, Gr.Mumbai, dismissing the motion taken out by the Appellants seeking relief of injunction against the

Respondent-Developer from demolishing the closed garage, which, according to the appellant, exists on the plot No.430 of TPS III of Bandra bearing CTS No. F/82 situate at 15th Road, Khar (W), Mumbai -52.

3. It appears from the averments made in paragraph 12 of the plaint that the garage in question was given in possession by the plaintiffs to the respondent developer for allowing him to use it temporarily for labourers, who were engaged for the construction of a new building. Admittedly the construction is complete and the members of the society are awaiting completion and occupation certificate. According to the respondent-developer after getting possession of the old garage, he demolished the same and constructed a temporary shed for the labourers and unless that shed is removed, the BMC would not issue completion and occupation certificate and that would cause inconvenience to the members of the society. The learned Judge in paragraphs 7 and 8 of the impugned order has considered this aspect in proper perspective. Paragraphs 7 and 8 read thus :

> "7. The plaintiff claimed their right to the closed garage under agreement dated 15.11.05, Exh.C, which is filed on compilation with the plaint at page 57 and the first term and condition of the agreement shows that the developer has to allot an enclosed garage under

the building as per BMC norms, in lieu of the closed garage of the plaintiffs. Thus the entitlement of the plaintiffs, rather plaintiff no.2 who had purchased the flat from the original vendor, is to get an enclosed garage under the building. By interpreting this clause, it can be said that even if the defendant no.1 provides enclosed garage under the stilt, the defendant No.1 would be complying and discharging its obligation under the agreement. The agreement does not disclose that an enclosed garage should be at some other place than in the stilt. The defendant No.1 developers in para 28 of its written statement have categorically mentioned that the defendant no.1 is under obligation to provide enclosed garage with three feet wall of grill on three sides and rolling shutter with grill in the front. If this is done by the defendant no. 1 in the stilt, it can be said that the defendant no.1 is providing enclosed garage to the plaintiffs. The defendant no.1 has come with the case that for doing so under the Development Control Regulation 1991, the plaintiff will be required to apply to the BMC and permission will be granted for one year, renewable from year to year, provided the plaintiffs produce ration card before the competent authority. This submission of the defendant no.1 is totally in consonance with the Clause 1 in the agreement Exh.C. In these circumstances, when according to the defendant no.1, the building is almost complete and completion certificate is required to be obtained from the BMC, it can be said that irreparable loss is caused to the society and the flat owners and not to the plaintiffs. Because of the present suit, the progress of the development is stopped.

8. A big issue was made before me, as to whether the old garage is in existence or not. The defendants claimed that it is not in existence, whereas the plaintiff claim that it is still in existence. The plaintiff has produced photographers, so also the defendant no.1 produced photographs, whereby showing that there is some construction in existence in the compound but certainly, not in the stilt. As stated earlier, the entitlement of the plaintiff to get enclosed garage and the defendant no.1 admits in para 28 of written statement, his

> obligation to provide the garage in the stilt, in the manner stated in para 28, no cause remains for the plaintiff to proceed with the present suit. In the instant case, the plaintiff did not try to apply for appointment of Commission for bringing facts regarding the old garage on record, an inference will have to be drawn that there is no such garage in existence at present. In these circumstances, I hold that the plaintiff has failed to prove prima facie that they would be succeeding in the suit at the trial of the suit. Consequently balance of convenience does not lie in favour of the plaintiff but it does lie in favour of the defendants."
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> (emphasis supplied)

4. Mr. Jain, learned counsel for the appellants invited my attention to the agreement dated 15.11.2005 to contend that unless a closed garage is provided to the appellant, the old garage cannot be demolished as provided in the agreement. He also invited my attention to the other documents placed on record to contend that under any circumstances the respondent developer is obliged to provide closed garage to the appellant and for that he would have to take steps to seek permission from the corporation to close the stilt area allotted to the appellant for parking purpose. In my opinion, all these contentions cannot be and need not be considered at this stage and they shall be dealt with by the trial court while dealing with the suit. The trial court, on the basis of the material on record has drawn an inference that the old garage does not exist. Even before this no material, such as photos, despite

opportunity, was produced to show that the old garage exists till this date. The question, in the instant appeal, is only whether injunction as prayed in the notice of motion could be granted ?. The learned Judge, in my opinion, has considered the prayer in proper perspective and has rightly dismissed the motion. For the reasons recorded in the impugned order and considering that the old garage, even if it exists, is not in possession of the appellant and he is not using the same for parking purpose.

5. In the circumstances, this appeal is dismissed. All contentions on merits, insofar as rights of the parties are concerned, are kept open.

6. In view of this order, nothing survives in Civil Application No.694/2007 and it is disposed of as such.

(D.B.BHOSALE,J.)

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